

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

IN THE MATTER OF

PAN AM RAILWAYS, INC. AND
BOSTON AND MAINE CORPORATION
38 Railroad Yard Road
East Deerfield, Massachusetts 01342

Respondent.

Proposing to Assess a Civil Penalty Under
Sections 309(g) and 311(b)(6) of the Clean
Water Act, 33 U.S.C. §§ 1319(g), 1321(b)(6)

Docket No. CWA-01-2015-0005

**COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

I. STATEMENT OF AUTHORITY

1. This administrative Complaint and Notice of Opportunity for Administrative Hearing ("Complaint") is issued to Pan Am Railways, Inc. ("Pan Am"), and the Boston and Maine Corporation ("Boston and Maine") (collectively "Respondents") pursuant to Sections 309(g) and 311(b)(6) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §§ 1319(g) and 1321(b)(6), as amended by the Oil Pollution Act of 1990, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22. The Complainant is the Director, Office of Environmental Stewardship, United States Environmental Protection Agency, Region 1 ("EPA").

2. Pursuant to Sections 309(g) and 311(b)(6) of the CWA, 33 U.S.C. §§ 1319(g) and 1321(b)(6), and in accordance with the Consolidated Rules of Practice, Complainant hereby provides notice of a proposal to assess a civil penalty against Respondents for 1) failing to comply with the terms and conditions of a National Pollutant Discharge Elimination System

(“NPDES”) permit and discharging stormwater containing pollutants into waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and 2) for failing to properly maintain and fully implement a Spill Prevention Control and Countermeasure (“SPCC”) Plan in accordance with the Oil Pollution Prevention regulations set forth at 40 C.F.R. Part 112, promulgated under the authority of Section 311(j) of the CWA, 33 U.S.C. § 1321(j).

II. STATUTORY AND REGULATORY BACKGROUND

National Pollutant Discharge Elimination System

3. The CWA is designed to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. Section 101(a) of the Act, 33 U.S.C. § 1251(a).
4. To accomplish the objectives of the Act, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into navigable waters except in compliance with the terms and conditions of a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and EPA’s implementing regulations, found at 40 C.F.R. Part 122.
5. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include “an individual, corporation, partnership [or] association.”
6. Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), defines “person” to include “an individual, firm, corporation, association, [or] partnership.”
7. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”
8. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, among other things, chemical wastes, biological materials, rock, sand, and industrial waste discharged into water.
9. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” to

include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”

10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”

11. Forty C.F.R. § 122.2 defines “waters of the United States” to include, among other things: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters; (iii) tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

12. Section 309(g) of the CWA, 33 U.S.C. § 1319, provides for the assessment of penalties for violations of Sections 301 and 308 of the CWA, 33 U.S.C. §§ 1311 and 1318, and for violating any condition or limitation in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.

Oil Pollution Prevention Regulations

13. Section 311(j)(1) of the Act, 33 U.S.C. § 1321(j)(1), provides that the President shall issue regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances . . . from onshore and offshore facilities, and to contain discharges”

14. Under the authority of Section 311(j)(1) of the Act, the Oil Pollution Prevention regulations, found at 40 C.F.R. Part 112, establish procedures, methods, and requirements for preventing the discharge of oil. These requirements apply to owners or operators of non-transportation-related facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products which, due to their location, could reasonably be expected to discharge oil in harmful quantities (as defined in

40 C.F.R. Part 110) to navigable waters of the United States or adjoining shorelines. 40 C.F.R. § 112.1(b). However, except as provided in 40 C.F.R. § 112.1(f), these requirements do not apply to the owner or operator of any facility which meets both of the following requirements:

- (1) the completely buried storage capacity of the facility is 42,000 U.S. gallons or less of oil; and
- (2) the aggregate aboveground storage capacity of the facility is 1,320 U.S. gallons or less of oil.

40 C.F.R. § 112.1(d)(2).

15. Under 40 C.F.R. § 112.3(a)(1), an owner or operator of an onshore facility that became operational prior to August 16, 2002 and that has discharged or, due to its location, could reasonably be expected to discharge, oil in harmful quantities into or upon the navigable waters of the United States must prepare and fully implement a Spill Prevention, Control, and Countermeasure ("SPCC") plan in accordance with 40 C.F.R. § 112.7.

III. ALLEGATIONS

16. Pan Am Railways, Inc. is a company organized under the laws of the state of Delaware with its principal place of business in Billerica, Massachusetts.

17. Boston and Maine Corporation is a company organized under the laws of the state of Delaware with its principal place of business in Billerica, Massachusetts.

18. Boston and Maine Corporation is a subsidiary of Pan Am Railways, Inc.

19. Each Respondent is a "person" within the meaning of Sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7) and 1362(5).

20. Respondents own and/or operate a railroad terminal at 38 Railroad Yard Road in East Deerfield, Massachusetts (the "Facility").

21. At the Facility locomotives are fueled and locomotives and boxcars are serviced, repaired, maintained, and cleaned.

22. Respondents control all daily business and industrial operations at the Facility, and otherwise meet the definition of “operator” of the Facility, as defined at Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), 40 C.F.R. § 112.2.

23. On September 23, 2005, EPA and the Massachusetts Department of Environmental Protection (“MassDEP”) issued an NPDES permit MA0000272 to Boston and Maine Corporation (“2005 NPDES Permit”). The 2005 NPDES Permit was modified on August 11, 2006 and expired¹, as amended, on November 22, 2010.

24. EPA and MassDEP reissued the permit on March 26, 2013 (“2013 NPDES Permit”).

25. The 2005 and 2013 NPDES Permits authorize Boston and Maine to discharge stormwater from six outfalls with serial numbers 001, 002, 003, 004, 005, and 006, subject to the conditions in the 2005 and 2013 NPDES Permits.

26. Outfalls referred to as numbers 001, 002, 003, 004, 005 and 006 in Respondents’ 2005 and 2013 NPDES Permits for the Facility discharge into wetlands or unnamed streams that flow into the Connecticut River.

27. Outfall numbers 001, 002, 003, 004, 005 and 006 are “point source[s]” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

28. The discharges from outfall numbers 001, 002, 003, 004 005 and 006 contain chemical wastes, biological materials, rock, sand, and industrial waste which are “pollutant[s]” within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

29. The wetlands and unnamed streams described in Paragraph 26 above, and the

¹ Because Respondent timely submitted a reapplication for its NPDES permit, the permit was administratively extended until issuance of the 2013 NPDES Permit.

Connecticut River and the Long Island Sound into which it flows are “waters of the United States,” as defined in 40 C.F.R. § 122.2, and, thereby, “navigable waters,” as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

30. The Facility is located near an area subject to flooding within the 100-year floodplain of the Connecticut River.

31. At all times relevant to the allegations in this Complaint, Respondents engaged in storing, using, and consuming “oil” or oil products located at the Facility within the meaning of 40 C.F.R. § 112.2.

32. At all times relevant to the allegations in this Complaint, the Facility had an aggregate above ground oil storage capacity greater than 1,320 gallons in containers each with a shell capacity of at least 55 gallons.

33. The Facility is an “onshore facility” within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

34. The Facility became operational prior to August 16, 2002.

35. The Facility is a “non-transportation-related” facility within the meaning of Appendix A to 40 C.F.R. Part 112, as incorporated by reference within 40 C.F.R. § 112.2.

36. Accordingly, the Facility is a non-transportation-related onshore facility which, due to its location, could reasonably be expected to discharge oil to navigable waters of the United States or its adjoining shorelines in a harmful quantity.

37. Respondents are therefore subject to the Oil Pollution Prevention regulations at 40 C.F.R. Part 112 at the Facility.

38. On September 23, 2013, an authorized representative of EPA visited the Facility to review compliance with Federal and State environmental laws and regulations, including

compliance with the CWA (the "Inspection").

IV. VIOLATIONS

COUNT 1: FAILURE TO COMPLY WITH NPDES PERMIT TERMS AND CONDITIONS/DISCHARGE OF STORMWATER NOT IN COMPLIANCE WITH NPDES PERMIT

39. Paragraphs 1 through 38 are incorporated herein by reference.

40. Part I.B.5.c. of the 2005 NPDES Permit states that:

An annual site inspection be conducted by appropriate personnel named in the SWPPP to verify that the description of potential pollutant sources required under part B.1. is accurate, that the drainage map has been updated or otherwise modified to reflect current conditions, and controls to reduce pollutants in storm water discharges identified in the SWPPP are being implemented and are adequate. A tracking or follow-up procedure must be used to ensure that the appropriate action has been taken in response to the inspection. Records documenting significant observations made during the site inspection must be retained as part of the SWPPP for a minimum of five (5) years.

41. Respondents did not conduct annual site inspections as required by the SWPPP for 2011 or 2012 in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

42. Part I.C.2 of the 2013 NPDES Permit requires that the permittee prepare a written SWPPP and that the SWPPP be completed or updated and certified by the permittee within 90 days after the effective date of the permit. The permittee is required to certify that its SWPPP has been completed or updated and shall be signed in accordance with the requirements identified in 40 C.F.R. § 122.22. A copy of this certification shall be sent to EPA and MassDEP within 120 days of the effective date of the 2013 NPDES Permit.

43. Respondents did not complete an updated SWPPP or submit the updated SWPPP and SWPPP certification to EPA and MassDEP until August 7, 2014; therefore, Respondents were out of compliance from June 25, 2013 through August 6, 2014, in violation of Section

301(a) of the CWA, 33 U.S.C. § 1311(a).

44. Part I.C.1 of the 2013 NPDES Permit requires the permittee to develop, implement, and maintain a SWPPP designed to reduce, or prevent, the discharge of pollutants in stormwater to the receiving waters identified in the permit.

45. Part I.C.4. of the 2013 NPDES Permit provides that best management practices (“BMPs”) must be selected and implemented to satisfy non-numeric technology-based effluent limitations, including at Part I.C.4.b, “good housekeeping measures designed to maintain areas that are potential sources of pollutants.”

46. During the Inspection, the EPA inspector observed the failure to observe good housekeeping measures including: the failure to maintain track mats designed to absorb oil drips; piles of debris exposed to the weather in various locations around the site; open dumpsters; active erosion of sediments; and catchbasins filled with sediment in need of cleaning.

47. Respondents provided an updated SWPPP dated August 7, 2014, describing improved housekeeping practices.

48. By failing to implement BMPs, including good housekeeping measures designed to maintain areas that are potential sources of pollutants, Respondents violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a) from at least September 23, 2013 through August 6, 2014.

49. Part I.C.4. of the 2013 NPDES Permit requires that BMPs must be selected and implemented to satisfy non-numeric technology-based effluent limitations, including in Part I.C.4.e, “[e]rosion and sediment controls designed to stabilize exposed areas and contain runoff using structural and/or non-structural control measures to minimize onsite erosion and sedimentation, and the resulting discharge of pollutants.”

50. During the Inspection, the EPA inspector observed significant erosion in the area

northeast of the Railroad Avenue where there is a parking lot and laydown area for sand, gravel, and other materials.

51. Respondents indicated to EPA that installation of erosion control structures to control erosion problems with the parking and material lay-down area would be complete by July 1, 2014.

52. By failing to implement BMPs, including erosion and sediment controls designed to stabilize exposed areas and contain stormwater runoff in violation of Part I.C.4 of the 2013 NPDES Permit, Respondents violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a) from at least September 23, 2013 through July 1, 2014.

53. From at least January 1, 2012 through August 6, 2014, each of Respondents' violations of the NPDES Permit is a separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), for each day on which the violation occurred or continued. In addition, from at least January 1, 2012 through August 6, 2014, each and every day on which Respondents discharged stormwater from the Facility in violation of the terms and conditions of the NPDES Permit is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**COUNT 2: FAILURE TO MAINTAIN AND FULLY IMPLEMENT A
SPILL POLLUTION CONTROL AND COUNTERMEASURE PLAN**

54. Paragraphs 1 through 53 are incorporated herein by reference.

55. During the September 23, 2013 Inspection and based on additional information submitted by Respondent, EPA determined that Respondents had an SPCC Plan for the Facility, but the SPCC Plan was deficient and Respondents neither maintained nor fully implemented the SPCC Plan, in violation of Section 311(j) of the Act.

56. Respondents failed to adequately provide for measures which would prevent the

discharge of oil from reaching waters of the United States and failed to implement specific requirements listed in 40 C.F.R. §§ 112.7 and 112.8, in accordance with good engineering practice. Respondents' failure to maintain and fully implement an SPCC plan, includes, but is not limited to the following deficiencies:

- a. Respondents failed to include in the SPCC plan a diagram identifying the location of each fixed oil storage container, secondary containment for each container, the storage area where mobile or portable containers are located, and a description of the type of oil in each fixed container and its storage capacity, as required by 40 C.F.R. § 112.7(a)(3). Respondents indicated in an October 15, 2014 letter to EPA that final updates to the Facility's SPCC plan would be completed shortly.
- b. Respondents failed to maintain appropriate secondary containment for oil storage container #8 (1,000 gallon tank besides the waste water treatment plant) to prevent a discharge of oil as required by 40 C.F.R. § 112.7(c) and 112.8(c)(2). Respondents indicated that the secondary containment for oil storage container #8 was addressed in an updated SPCC plan submitted December 9, 2013.
- c. Respondents failed to provide appropriate secondary containment for approximately eight 55-gallon drums in the Engine House as required by 40 C.F.R. § 112.7(c). Respondents indicated that they addressed secondary containment for all 55-gallon drums in the updated SPCC plan submitted December 9, 2013.
- d. Respondents failed to have the SPCC plan certified by a Professional Engineer ("PE") and failed to have full approval of management in writing as required by 40 C.F.R. § 112.3(d) and 112.7. Respondents obtained PE certification on November 26, 2013, and obtained management approval on December 2, 2013.

57. By failing to maintain and fully implement a SPCC plan for the Facility in accordance with the requirements of 40 C.F.R. §§ 112.7 and 112.8, as described above, Respondents violated 40 C.F.R. § 112.3 and Section 311(j) of the CWA, 33 U.S.C. § 1321(j), from at least September 23, 2013 until October 15, 2014

V. NOTICE OF PROPOSED ASSESSMENT OF CIVIL PENALTY

58. Based upon the foregoing allegations and pursuant to the authority of Sections

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U.S. EPA, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109

309(g) and 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. §§ 1319(g) and 1321(b)(6)(B)(ii), the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. §§ 2461 *et seq.*, the Debt Collection Improvement Act of 1996, 31 U.S.C. §§ 3701 *et seq.*, and the rule for Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. §§ 19.1-19.4 (61 Fed. Reg. 69360 (Dec. 31, 1996); 69 Fed. Reg. 7121 (Feb. 13, 2004); 73 Fed. Reg. 75340 (Dec. 11, 2008); 78 Fed. Reg. 66643 (Nov. 6, 2013)), Complainant proposes that a Final Order assessing civil penalties be issued against Respondents of up to sixteen thousand dollars (\$16,000) per day for each day during which the violations continued, up to a maximum of one hundred and eighty-seven thousand five hundred dollars (\$187,500) for each count in the Complaint.

59. Based on the foregoing allegations, EPA seeks to assess civil penalties for each day of Count 1 (NPDES Permit violations), which was for a total of up to 949 days, and Count 2 (SPCC violations), which was for a total of up to 389 days, up to a maximum of one hundred and eighty-seven thousand five hundred dollars (\$187,500) for each Count.

60. The NPDES Permit violations alleged in Count 1 above represent significant violations of the CWA because of the extent and duration of the violations and because of the importance in ensuring that contaminated stormwater runoff does not contribute to the impairment of water quality.

61. The violations of the Oil Pollution Prevention regulations alleged in Count 2 above represent significant violations of the CWA because failure to maintain and fully implement an adequate SPCC plan leaves a facility unprepared to deal with an oil spill and to prevent a spill from having potentially serious environmental consequences.

62. Prior to any hearing on this case, EPA will file a document specifying a proposed penalty, as required by the Consolidated Rules of Practice, taking into account the seriousness,

nature, circumstances, extent, and gravity of the violation, or violations, and Respondents' prior compliance history, the degree of culpability for the cited violations, any economic benefit or savings accruing to Respondents resulting from the violations, Respondents' ability to pay the proposed penalties, and such other matters as justice may require.

VI. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

63. Pursuant to Sections 309(g) and 311(b)(6) of the Act, 33 U.S.C. §§ 1319(g) and 1321(b)(6), and 40 C.F.R. § 22.14, notice is hereby given that Respondents have the right to request a hearing on any material fact alleged raised in this Complaint and on the appropriateness of any proposed penalty. Any such hearing would be conducted in accordance with the Consolidated Rules of Practice, 40 C.F.R. Part 22, a copy of which is enclosed. Members of the public, to whom EPA is obliged to give notice of this proposed action, have a right under Sections 309(g)(4)(B) and 311(b)(6)(C) of the Act, 33 U.S.C. §§ 1319(g)(4)(B) and 1321(b)(6)(C), to comment on any proposed penalty and to be heard and to present evidence at the hearing.

64. Respondents' Answer(s) must comply with 40 C.F.R. § 22.15 and must be filed with the Regional Hearing Clerk at address listed below within thirty (30) days of receipt of the Complaint. To be entitled to a hearing, Respondents must include its request for a hearing in its Answer to the Complaint.

65. The original and one copy of the Answer(s), as well as a copy of all other documents which Respondent files in this action, must be sent to:

Wanda Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100 (Mail Code: ORA18-1)
Boston, Massachusetts 02109-3912

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U.S. EPA, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109

Respondents should also send a copy of the Answer, as well as a copy of all other documents which Respondents files in this action, to Jeffrey Kopf, the attorney assigned to represent EPA and designated to receive service in this matter at:

Jeffrey Kopf
Senior Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100 (Mail Code: OES04-4)
Boston, Massachusetts 02109-3912


66. If Respondents fail to file a timely Answer to this Complaint, they may be found to be in default, pursuant to 40 C.F.R. § 22.17, which constitutes an admission of all the facts alleged in the Complaint and a waiver of the right to a hearing.

67. Pursuant to 40 C.F.R. § 22.17(d), the penalty assessed in any default order shall become due and payable by Respondents without further proceedings thirty (30) days after the default order becomes final.

68. The filing and service of documents, other than the complaint, rulings, orders, and decisions, in all cases before the Region 1 Regional Judicial Officer governed by the Consolidated Rules of Practice may be filed and served by email, consistent with the "Standing Order Authorizing Filing and Service by E-mail in Proceedings Before the Region 1 Regional Judicial Officer," a copy of which has been provided with the Complaint.

VII. CONTINUED COMPLIANCE OBLIGATION

69. Neither assessment nor payment of a civil penalty pursuant to Sections 309(g) and 311(b)(6) of the CWA, 33 U.S.C. §§ 1319(g) and 1321(b)(6), shall affect Respondents' continuing obligation to comply with the CWA, the regulations promulgated thereunder, or any other applicable requirements of Federal, State, or local law.



Susan Studlien, Director
Office of Environmental Stewardship
U.S. Environmental Protection Agency
Region 1 – New England

January 30, 2015
Date

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

IN THE MATTER OF)

PAN AM RAILWAYS, INC. AND)
BOSTON AND MAINE CORPORATION)
38 Railroad Yard Road)
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Administrative Complaint and Notice of Opportunity to Request a Hearing has been sent to the following persons on the date noted below:

Original and one copy,
hand-delivered:

Ms. Wanda Santiago
Regional Hearing Clerk
U.S. EPA, Region I (ORA18-1)
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Copy by Certified Mail, Return Receipt Requested, with a copy of 40 C.F.R. Part 22, and a copy of Standing Order Authorizing Filing and Service by E-mail in Proceedings Before the Region 1 Regional Judicial Officer:

David Fink, Director/President
Pan Am Railways, Inc.
Boston and Maine Corporation
1700 Iron Horse Park
N. Billerica, MA 01862

Copy by regular U.S. mail:

Dana Banks, Environmental Director
Pan Am Railways, Inc.
Boston and Maine Corporation

1700 Iron Horse Park
N. Billerica, MA 01862

Copy by Certified Mail, Return Receipt Requested, with a copy of 40 C.F.R. Part 22, and a copy of Standing Order Authorizing Filing and Service by E-mail in Proceedings Before the Region 1 Regional Judicial Officer:

Corporation Service Company
Agent for Pan Am Railways, Inc.
84 State Street
Boston, MA 02109

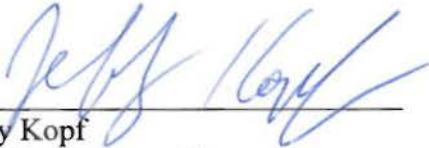
and

Robert Culliford
Agent for Boston and Maine Corporation
1700 Iron Horse Park
N. Billerica, MA 01862

Copy, by Certified Mail,
Return Receipt Requested

Pamela Talbot
Massachusetts Department of Environmental Protection
One Winter Street, 7th Floor
Boston, MA 02108
Pamela.talbot@state.ma.us

Dated: 1/30/15



Jeffrey Kopf
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